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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

Barbee B. Lyon
Counsel of Record
James C. Loy
David S. Aman
TONKON, TORP, GALEN,
MARMADUKE & BOOTH
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2099
(503) 221-1440
Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Does the state action doctrine permit a federal court to review the orders and actions of a state regulatory agency to determine whether they conform substantively and procedurally to state law?

2. In applying the state action doctrine to determine whether conduct of state-regulated utilities is immune from federal antitrust liability, must a federal court accept the clearly expressed view of the state regulatory agency and reviewing state courts as to the substance of the state policy?

3. Where a final state court judgment between the parties establishes that a state regulatory decision compelled a party's conduct pursuant to state law, may a federal court impose treble damages for that conduct?

4. Must the decisions and conduct of a state regulatory agency subsequent to an initial, arguably ambiguous order of that agency be considered in determining whether there is a clearly articulated policy?

5. If a regulated utility relies on the appearance of legality when a state regulatory agency's exercise of power is unauthorized, does it nevertheless have immunity under the state action doctrine?

PARTIES TO THE PROCEEDING

In addition to the parties named in the case caption, the Public Utility Commission of the State of Oregon was a party to the proceedings in the Court of Appeals.

Petitioner Portland General Electric Company is a corporation. Its parent company, as of the time this petition is prepared, is Portland General Corporation. However, Portland General Corporation is on the eve of a major corporate transition, and petitioner will supplement this disclosure when the new information becomes available.

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Portland General Electric Company (PGE) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The first opinion of the Court of Appeals is reported at 60 F.3d 1446. (App. C.) A second opinion vacated the first, and is reported at 103 F.3d 1446. (App. B.) The third and final opinion modified the second, and is reported at 111 F.3d 1427. (App. A.)

The first opinion of the district court granting partial summary judgment is reported at 770 F.Supp. 562. (App. E.) Later opinions granting final summary judgment were not reported.

The 1992 opinion of the Oregon Public Utility Commission, confirming that it had made a territorial allocation of Portland in 1972, is reported at 133 P.U.R. 4th 145. (App. M.) It was affirmed by a Circuit Court of the State of Oregon in an unreported opinion (App. O), and subsequently affirmed without opinion by the Oregon Court of Appeals at 125 Or. App. 338, 865 P.2d 1342 (App. P), review denied, 318 Or. 478, 871 P.2d 123. (App. Q.)

JURISDICTION

The Court of Appeals entered an amended judgment on December 27, 1996. Upon a timely petition for rehearing, the Court of Appeals denied the petition on April 3, 1997. (App. A 1-3.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Full faith and credit

"The records and judicial proceedings of any court of any ... State ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ..." 28 U.S.C. § 1738.

Sherman Act § 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal ..." 15 U.S.C. § 1.

Oregon state statutes

The Oregon statutes are in App. R.

STATEMENT OF THE CASE

PGE agrees with the Court of Appeals that the facts are undisputed. The Court should also bear in mind that this case was decided by summary judgment against PGE. PGE's evidence must therefore be believed, and all justifiable inferences drawn in favor of PGE. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1966).

Oregon adopts a policy to eliminate competition between utilities.

Portland is served by two electric utilities, PGE and Pacific Power & Light (PP&L). In the past, PGE and PP&L competed for the same customers. Two power lines, one from each utility, ran down many city streets. (App. J 3-4.)

The Oregon Legislature disapproved of such competition, considering it wasteful to maintain two duplicate electric systems to serve a single area. Two systems cost more than one, and the consumers paid the extra costs in their rates. (App. J 3-4.) There was also a safety hazard in having live wires from different utilities adjacent to each other on city streets. (App. M 5.)

The Oregon Legislature therefore declared a state policy to eliminate such duplication, and to prevent it in the future. Or. Rev. Stat. § 758.405, (App. R 3.) Most other states have similar statutes to ensure that only one utility serves a territory or a customer. (CR[1] 267, Ex. 45 at 34-36; CR 292, Ex. 89 at 9.)

The Oregon statute allows competing utilities to allocate territories and customers between themselves by contract. Or. Rev. Stat. § 758.410, (App. R 3-4.) The contract should designate "which territories and customers are to be served by which of said contracting parties." *Id.* Such a contract has to be submitted to the Oregon Public Utility Commission (OPUC) for a hearing. Or. Rev. Stat. § 758.415, (App. R 4.) If OPUC finds that the contract satisfies four statutory criteria, competition is thereafter forbidden by law. *Id.*; Or. Rev. Stat. § 758.450(2), (App. R 7.) Although the utility would thereby acquire a legal monopoly, it could not charge monopoly rates because its rates are controlled by OPUC. (CR 266, Ex. 45, pp. 19-26; CR 266, Ex. 46, pp. 17-18.)

PGE and PP&L contract to allocate Portland between them.

PGE and PP&L entered into a contract in 1972 to divide Portland between them (the 1972 Agreement). This 1972 Agreement established the metes and bounds of different "service areas" for PGE and PP&L in Portland. (App. S 12.)

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[1] CR refers to the Clerk's Record in the district court.

Parcel C, where plaintiff Columbia Steel is located, was to become PGE's service area. (App. S 2; map at App. M 35.) In Parcel C, PGE was to acquire PP&L's substations, poles, lines, and other property.[2] *Id.* PGE was also to acquire all of PP&L's customer accounts in Parcel C (not including Columbia Steel, however, because it already happened to be a PGE customer.) (App. S 7-8.) All in all, 28,000 customers were to be transferred from PP&L to PGE, and 38,000 from PGE to PP&L. (App. J 3.) Overall, the contract effected a massive exchange of property and customers, separated the respective systems of the two utilities into non-overlapping areas, and eliminated the competition between them.

The City of Portland had objected in the past to allocating territories in Portland. (ER[3] 149, ¶13.) This derived partly from a provision in the Portland City Charter against "exclusive" utility franchises. A City official objected to the word "exclusive" in the 1972 Agreement, and that word was omitted. (CR 265, EX 12, p. 6.) The statute, on the other hand, did not require the use of the word "exclusive". (App. R 3-5.) The City adopted an ordinance that approved the 1972 Agreement and also referred to the Charter provision.

OPUC approves the 1972 Agreement.

OPUC held a hearing, and issued an Order (1972 Order) approving the 1972 Agreement in all respects, except for one that bears on the dispute in this case. (App. J 8.) PGE and PP&L proposed to retain their respective employees as customers, even if they lived in the service area being transferred to the other utility, so that they could keep their employee discounts. This could be done by "wheeling" power

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[2] The parcels bore different labels in OPUC's subsequent order approving the contract. (App. J 12-13.)

[3] ER Refers to the Excerpts of Record in the Court of Appeals.

to them over the lines of the other utility, since the two systems were interconnected.

OPUC rejected this proposal in the following words in the 1972 Order:

> "This method results in discrimination in that the company serving the area should serve all persons living in that area and, just because the customer is an employee of the utility, this should not permit him the right to choose which utility service he will take. ... [T]hese employees, like any other customers in the area, must become the customers of the new utility serving the area." (App. J 8.)

This prohibition against customer choice did not originate with PGE or PP&L. It was OPUC itself that imposed, as a matter of state policy, a prohibition against allowing customers to choose a utility other than the one serving the area.

> *OPUC insists that it allocated Portland between PGE and PP&L.*

After OPUC had issued the 1972 Order, OPUC consistently declared that it had thereby allocated territory and customers in Portland, and had eliminated competition. (App. M 21-23.) In an Order issued the following year, OPUC declared that PGE had a "state-approved service area allocation" within an area "including ... Portland." (App. K.) The year after that, OPUC set PP&L's rates in Portland higher than PGE's, saying

> "The two companies no longer competitively serve the same areas. Their respective areas of service within Portland have been defined. Thus, with the lack of competition, the justification for rate uniformity is said to have disappeared." (App. L 2.)

The Portland City Attorney testified that he intervened in OPUC proceedings to assert the City's position, and to oppose OPUC's assertion that its 1972 Order had effected an allocation of territories in Portland. (CR 265, Ex. 14, ¶ 2, 6.) After the City's position was rebuffed, the City acquiesced and considered the issue of territorial allocations to be closed. *Id.*

For nearly 20 years, OPUC's policy went unchallenged. OPUC witnesses testified that if PGE and PP&L had tried to compete in Portland, OPUC would have tried to stop them. (CR 275 ¶ 5.) They testified that they consistently treated PGE as if it had been granted an exclusive Portland service territory pursuant to the 1972 Order. *Id.*

In the late 1980's, however, Columbia Steel did challenge OPUC's policy. PGE's industrial rates to customers like Columbia Steel had become higher than PP&L's, and Columbia Steel demanded to switch to PP&L. (App. F 8.) Although Columbia Steel was in PGE's service area, its plant happened to lie beneath a PP&L transmission line that crossed PGE's service area. Even so, it was not technically possible for PP&L to serve Columbia Steel directly for a long time, for PP&L would have to construct a new substation to duplicate the one by which PGE was already serving Columbia Steel. (CR 223, ¶ 82.) Columbia Steel therefore demanded that PGE temporarily "wheel" PP&L power to Columbia Steel over PGE lines. (App. F 9-10.) That was the same method that the 1972 Order had prohibited the utilities from using, even for their own employees. (App. J 8; *see above* at p. 5.)

The disparity in industrial rates that prompted Columbia Steel's desire to switch utilities had been created by OPUC itself through its rate-setting process. And while OPUC had fixed PGE's *industrial* rates *higher* than PP&L's, it had also set PGE's *residential* rates *lower* than PP&L's. (CR 292, Ex. 88, ¶¶ 4-5.) It was only because competition had been eliminated that OPUC could and did establish different rates for PGE and PP&L. (App. L 2.) If sophisticated industrial customers like

Columbia Steel could abandon PGE in search of a lower industrial rate, OPUC at a minimum would have to impose higher rates on PGE's residential customers in order to meet PGE's overall costs. (CR 266, Ex. 45, p. 58; CR 266, Ex. 46, p. 18-19.)

When Columbia Steel was demanding to switch from PGE to obtain the lower PP&L rate, the Oregon Department of Justice notified PGE and PP&L as follows:

> "The PUC believes that ... there has been an allocation of territory such that Pacific [PP&L] cannot offer service to a customer in PGE's territory. ... [W]e read Order No. 72-870 to have made an allocation." (App. U.)

Following this guidance from the State of Oregon, PGE accordingly rejected Columbia Steel's demand that PGE wheel PP&L power to Columbia Steel over PGE lines. PGE stated that Columbia Steel had to buy its electricity from PGE. (ER 66.) The district court would later hold that this "assertion by PGE of an exclusive right to provide electric services to Columbia Steel" entitled Columbia Steel to summary judgment for treble damages from PGE. (App. F 22.)

Columbia Steel sues.

Twenty days after PGE's rejection of Columbia Steel's demand, Columbia Steel filed its complaint alleging that PGE had monopolized or attempted to monopolize the service area that had been designated as PGE's, in violation of Section 2 of the Sherman Act.[4] (15 U.S.C. § 2.) Jurisdiction was based on 28 U.S.C. §§ 1331 and 1337.

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[4] PP&L also filed a complaint for a declaratory judgment to resolve the dispute. (ER 1.) The district court consolidated the two cases, and some of the district court opinions bear the caption of PP&L's declaratory action.

According to Columbia Steel, OPUC's 1972 Order was deficient, and did not effect an allocation of Portland between PGE and PP&L. Since OPUC held the opposite view, Columbia Steel named OPUC as a defendant, and demanded an injunction to prevent OPUC from enforcing its interpretation of its own Order[5]. (ER 35 ¶ 28; ER 38 ¶ 39; ER 39 ¶ 3A, ER 166 ¶ 89; ER 170 ¶ 103).

OPUC rules that it had allocated Portland in 1972 pursuant to Oregon law.

PGE commenced a proceeding before OPUC, seeking a declaratory ruling that the 1972 Order had indeed been effective to allocate Portland.[6] (App. M 3.) Columbia Steel intervened in this OPUC proceeding to oppose such a declaration. (App. M 3-4.)

OPUC ruled in favor of PGE in Order No. 92-557 (1992 Order). (App. M.) OPUC held that not only had it intended to make an allocation in its 1972 Order, but that it had in fact done so. (App. M 1, M 23.) OPUC declared that "the previous allocations" of 1972 were "confirmed". (App. M 1.) OPUC's opinion explained that all the requirements of the Oregon statutes for such an allocation had been met by its 1972 Order, despite some possible ambiguities which it corrected nunc pro tunc. (App. M 18, 23.) As for the City's opposition to exclusive franchises, OPUC held that its powers under the statute were paramount over the City Charter. (App. M 11-13.)

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[5] Oregon has a three-member Public Utility Commission, and Columbia Steel's complaint named each as a defendant. In 1972, however, Oregon had a single "Public Utility Commissioner". This petition uses "OPUC" as shorthand for both.

[6] PGE's application for a declaratory ruling had three parts. The first part sought the declaratory ruling stated above. Parts two and three sought alternative relief, in the event that part one was denied. (App. M 3.)

Columbia Steel petitioned for reconsideration, but OPUC adhered to its ruling in Order 92-1135[7]:

> "The correction to Order No. 72-870 supplied missing statutory citations to clarify the decisions made. The correction does not give retroactive effect to Order No. 92-557, but conforms Order No. 72-870 to the actual decisions made and followed.... While the wording of Order No. 72-870 might have been clearer in some respects, there was no doubt as to its substance." (App. N 2.)

Columbia Steel appealed OPUC's decision in accordance with the Oregon procedure by filing a complaint in Oregon circuit court. The Oregon circuit court affirmed the OPUC 1992 Orders. (App. O.) Columbia Steel then appealed to the Oregon Court of Appeals, which affirmed without opinion. (App. P.) The Oregon Supreme Court denied review. (App. Q.)

> *The district court, however, rules to the contrary that OPUC did not allocate Portland in 1972 in accordance with Oregon law. The court imposes treble damages on PGE.*

Although Columbia Steel's arguments were rejected by final Order of OPUC and final judgment of the Oregon courts, that did not deter the federal courts below from accepting them.

Soon after the OPUC proceeding was commenced, OPUC and PGE had moved for a stay of the district court proceedings in deference to the primary jurisdiction of OPUC. The district court refused, saying that OPUC could present its opinion about its 1972 Order as a party to the district court litigation. (App. D 7-8.)

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[7] The term "1992 Orders" refers to both Order 92-557 and Order 92-1135.

The district court then granted partial summary judgment to Columbia Steel, holding that OPUC's 1972 Order did not effect an allocation of territories and customers under Oregon law. (App. E 17-18.)

Nine months later, OPUC issued its contrary holding in its 1992 Order set forth above. (App. M.) The district court nevertheless refused to reconsider its own decision in light of the contrary OPUC decision. (ER 136, 143.) The district court also refused PGE's motion to certify to the Oregon Supreme Court the question of the interpretation of the OPUC 1972 Order. (ER 136, 143.)

Columbia Steel amended its complaint to add a new claim under Section 1 of the Sherman Act (15 U.S.C. § 2), alleging that PGE and PP&L's agreement to divide Portland was an unlawful conspiracy. (ER 146.) The district court granted summary judgment to Columbia Steel on this Section 1 claim. (App. F 16, 22.) Columbia Steel was held entitled to the damages it incurred "as a direct result of the assertion by PGE of an exclusive right to provide electric services to Columbia Steel."[8] (App. F 22.) OPUC's contrary holding in the parallel OPUC proceeding had by this time been affirmed by the Oregon circuit court, but the district court again refused to reconsider its own view in spite of the state court judgment between the parties. (App. G 1-3.)

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[8] The damages stopped running in July, 1991, because Columbia Steel was transferred to PP&L as the result of a settlement. PGE understood by then the direction in which the district court was headed, and transferred PP&L to stop the accrual of further treble damages. In exchange, PP&L transferred property to PGE having equal value to the revenues PGE lost thereby, thus keeping the transfer of Columbia Steel from having an adverse effect on PGE's other ratepayers. (App. F 12.) The OPUC would later enter an Order approving the transfer of Columbia Steel to PP&L, citing a public policy in favor of settling disputes, and concluding that the transfer would not have an adverse effect on PGE's other customers. (App. M 29-30.)

Although it imposed treble damages on PGE, the district court nevertheless acknowledged that PGE's conduct all along had been in conformity with the instructions it had received from OPUC, its regulatory agency:

> "In the years after the 1972 Agreement was signed and after the OPUC issued Order No. 72-870, the OPUC has acted to prevent PGE from duplicating facilities in the territory serviced by PP&L, and vice versa, with the intended effect of eliminating competition in the provision of electric services in the territories which were the subject of the transfer of electric distribution properties and customer accounts in the 1972 Agreement." (App. F 7.)

PGE demanded a right to a jury trial at least on the question whether it acted out of an intent to obey its regulatory agency, or because of the alleged unlawful conspiracy with PP&L. The district court denied the request for a trial, deciding this issue like all the others by summary judgment.

The district court entered final judgment against PGE on the Section 1 claim for $1.4 million. (App. H, I.) Columbia Steel represented that it would dismiss its remaining claims upon collecting the judgment from PGE. (App. H 4.) The judgment was bonded, and there is no reasonable doubt that Columbia Steel can collect it.

The Court of Appeals' first opinion reverses the district court.

The Court of Appeals' initial opinion reversed the district court, and held that PGE was protected by the state action doctrine. (App. C.) The court acknowledged that the Oregon legislature had clearly articulated a policy to replace competition with regulation. (App. C 8.) It acknowledged that OPUC was actively engaged in supervising the division of the Portland market. (App. C 18.)

This first opinion also held, as did the later opinions, that the 1972 Order authorizing the allocation of Portland must itself satisfy the "clear articulation" test of the state action doctrine. (App. C 8.) As to whether it did, the court said that "the 1972 Order is not particularly clear regarding the PUC's intention to permit a permanent division of the Portland market". (App. C 12.) The opinion nevertheless concluded that such a permanent division was a "foreseeable" result of the 1972 Order, applying the "foreseeability" test articulated in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). (App. C 10, 12.) This first opinion held that PGE's conduct met that test. *Id.*

The Court of Appeals' second and third opinions affirm the district court.

Columbia Steel filed a petition for rehearing, which was supported by an amicus brief from the Antitrust Division of the Department of Justice. The Antitrust Division objected to the following articulation of the "foreseeability test" in the first opinion:

> "[P]rivate conduct is immunized if it is a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct." (App. C 11.)

The Antitrust Division, however, did not express an opinion whether the case should be decided for or against PGE. (Brief of the United States at 12-13.)

On rehearing, the Court of Appeals reversed itself, vacated its first opinion, and ruled in favor of Columbia Steel in a second opinion. (App. B.) On further rehearing, the Court of Appeals issued a third opinion that slightly modified the second, but adhered to its ruling. (App. A.)

Like the first opinion, the second and third opinions held that the first part of the *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* 445 U.S. 97, 103-04 (1980) test---clear articulation and affirmative expression by the state of a policy to displace competition---has two subparts. In addition to the usual requirement that the state legislature must express a clear policy, the state *agency* must also express with sufficient clarity that the policy is to apply in the particular case. (App. A 14-15.) The Court then reexamined the OPUC 1972 Order and declared that it was not sufficiently clear to pass the test. (App. A 15.) The 1972 Order did not use the word "exclusive" in describing the service territories in Portland, and the City of Portland had objected to exclusive franchises. (App. A 15.) Nor did the 1972 Order cite the Oregon statute authorizing territorial allocation. (App. A 16.) The Court therefore concluded:

> "In sum, the OPUC did not 'forthrightly state' a policy of the state of Oregon that was 'clear in its purpose' to displace competition in the Portland market with territorial monopolies." (App. B 2, A 17.)

The Court of Appeals then decided it was not bound by OPUC's holding in OPUC's 1992 Orders, nor by the final judgment of the Oregon courts affirming those Orders. However, the Court of Appeals did not mention or address OPUC's reasoning in the 1992 Orders as to why the absence of the word "exclusive" or the absence of a statutory citation in the 1972 Order did not prevent the 1972 Order from effecting an allocation. (App. M 16-23, N 2-3.) Nor did the Court of Appeals mention or address OPUC's reasoning that the City of Portland had been powerless to prevent OPUC from making an allocation of territory in Portland. (App. M 11-12.)

Neither did the Court of Appeals acknowledge that OPUC held that it *had* allocated Portland in 1972. Instead, the Court

of Appeals characterized the issue decided by OPUC as merely one of "intent":

> "The issue decided by the 1992 OPUC is whether the 1972 OPUC had the intent to approve the allocation of exclusive service territories." (App. A 24-25.)

That, said the Court of Appeals, was different from the question that it was deciding. For the purposes of the state action doctrine, it did not matter what the state actually intended. It only mattered whether the state had *expressed* that intent in 1972 with enough clarity to meet the "rigorous" test that the court applied in 1997. (App. A 25.) So even though the Court of Appeals acknowledged there was a final state judgment that PGE had acted in conformity with the intent of the state, PGE was still liable for treble damages because the state had not *articulated* that intent in its 1972 Order with sufficient clarity to satisfy the court:

> "In other words, state-action immunity is a question of federal antitrust law that turns on the clarity of a state's expression of its policy, not the subjective intent of its policymakers."

As for the alleged lack of clarity of the 1972 Order, however, the Court of Appeals did not mention that provision in which OPUC rejected the utilities' proposal for limited wheeling of power to their employees, declaring instead that a customer did not have "the right to choose which utility service he will take", and that all customers" must become the customers of the new utility serving the area." (*See above* at 5.) In the first opinion of the Court of Appeals, this provision had been emphasized in rejecting the argument of Columbia Steel. (App. C 13-14.)

The Court of Appeals therefore affirmed the judgment below, except that it ordered the district court to impose additional damages on PGE. (App. A 35-36.) The district court had limited the damages to a one-year period in 1990-91.

There was evidence, however, that in 1987 Columbia Steel had requested PP&L to provide service, and PP&L refused after having contacted PGE. According to the Court of Appeals, that was enough to justify summary judgment against PGE for treble damages for the 1987-1990 period as well.[9]

REASONS FOR GRANTING THE WRIT

This is a clash between state authority and federal authority. It is undisputed that OPUC, an agency of the state of Oregon, told PGE and PP&L not to compete in Portland. For two decades after the 1972 Order, OPUC consistently took the position that it *had* thereby allocated Portland, and that the utilities were prohibited from competing. That was the very reason that Columbia Steel made OPUC a party defendant to this case. Yet federal law has now imposed treble damages on PGE for doing what it was told to do by the state regulatory agency having authority over PGE.

The purpose of the state action doctrine is to prevent just such conflicts. It is designed to answer the question whether the challenged restraint on competition is truly that of the state, or is merely the action of private parties. *Patrick v. Burget*, 486 U.S. 98, 100 (1988). If it is the state's, the antitrust laws were not intended to interfere. *Midcal*, 103-04.

The decision below stands the state action doctrine on its head. Instead of serving federalism, the Court of Appeals made the state action doctrine a barrier to thwart state policy. The Court of Appeals turned the "clear articulation" requirement into a mechanistic rule by which that the words of a 25-year old state Order fail the Court's rigid standard for "clarity", notwithstanding the state's actual intent, and notwithstanding

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[9] The court of appeals refused to stay its mandate pending this petition for certiorari, so the additional damages are now being calculated by the district court. The final judgment will be approximately $3.7 million, according to Columbia Steel's calculations.

decades of consistent interpretation and instruction by the state agency.

I. The decision below conflicts with this Court's decisions on the state-action doctrine.

The *Midcal* test distills the state action doctrine into a two-prong test:

> "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself."

F.T.C. v. Ticor Title Insurance Co., 504 U.S. 621, 632-34 (1992); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* 445 U.S. 97, 105 (1980).

As for the first prong of the *Midcal* test, the Court of Appeals and all the parties agree that the Oregon statute satisfies the test, that it clearly articulated and affirmatively expressed a state policy to displace competition in the delivery of electricity to customers. According to precedent, this should have been sufficient. One applies this first prong of the test by looking at what the legislature has said. *Southern Motor Carriers Rate Conference v. U.S.*, 471 U.S. 48, 63, 64 (1985).

> "As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied."

Id. at 64.

As for the second prong of the test, it is hardly in dispute---at least on the surface. The district court found as a fact that OPUC actively supervised the market division in Portland. (*Supra*, p. 11.) The Court of Appeals dismissed out of hand

Columbia Steel's desultory challenge on this point in its first opinion (App. C 18), and said nothing to the contrary in the second opinion.

If the first prong is satisfied by the Oregon statute, and if the second prong is satisfied by undisputed active supervision - why then was PGE's state action defense rejected?

It was rejected because the Court of Appeals grafted an additional requirement onto the first prong of the *Midcal* test. The first prong, for the Court of Appeals, now has two subparts. *First* is the familiar requirement that the legislature must clearly articulate the policy to displace competition. *Second* is the new requirement that the state *agency* must also clearly articulate that the policy is in force in the particular instance in question. That is, after the Oregon legislature articulated a policy to displace utility competition in Oregon, OPUC had to clearly articulate that it has been displaced in Portland. (App. A 14-15.)

PGE's state action defense failed, according to the Court of Appeals, because of this new second subpart. OPUC, said the Court of Appeals, had not articulated with sufficient clarity that the state policy applied in Portland to displace competition there. (App. A 15.) There are two things wrong with this new graft by the Court of Appeals onto the *Midcal* test.

First, it is out of step analytically with this Court's precedents. When this Court has examined what an *agency* says and does, it has done so under the "active supervision" second prong of the test---not, as did the Court of Appeals here, under the "clear articulation" first prong of the test. Such was the analytic framework under which this Court analyzed *Ticor*: the uniform rates that title insurers had agreed upon had not been sufficiently authorized by the responsible state agencies, and this Court treated that as an *active supervision* question. 504 U.S. at 637-39. *Southern Motor Carriers* followed the same analytic framework, in mirror image: the state agencies there *did*

sufficiently authorize the uniform rates that had been agreed upon by the carriers, and this Court also treated that as an active supervision question. 471 U.S. at 62, 65-66.

If the Court of Appeals had followed the same analytic framework, PGE would have prevailed. There would have been no new subpart to the state action test that required clear articulation by the state agency, and both prongs would have been satisfied.

Second, the analytic error just described masks a more serious one. Cases like *Ticor* are numerous where there is clear articulation by the legislature, but insufficient active supervision. The reverse is much less common: cases where there is active supervision of anticompetitive conduct by the agency, but no clear articulation by the legislature. (The *Lease Lights* case[10] discussed *infra* at p. 26 is one, for the agency was pursuing a policy that had not in fact been authorized, in this case by the state constitution.)

This case, however, is a paradox. The Court of Appeals held that OPUC did not clearly articulate a policy to displace competition in Portland, yet it is an unchallenged finding of fact that OPUC was actively supervising just such a policy for 20 years. Actively supervising a policy that one has not articulated is a difficult feat, especially since OPUC actively supervises the utilities by articulating to them what they should and shouldn't do.[11]

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[10] *Lease Lights, Inc. v. Public Service Co. of Okla.*, 849 F.2d 1330 (10th Cir. 1988), cert. denied, 488 U.S. 1019 (1989).

[11] This may explain why this Court in the past has analyzed what an agency says and does under the second prong of active supervision, since articulation by the agency and active supervision by the agency are more or less the same thing.

Like many paradoxes, this one conceals something hidden. What is hidden is a serious inroad on the principles of federalism that the state action doctrine is designed to serve.

The Court of Appeals does not really mean that OPUC has not clearly articulated a policy to displace competition in Portland. The record is full of evidence that OPUC has been clearly articulating just that policy for two decades. (*See above,* p. 5) When Columbia Steel was demanding to switch utilities, the Oregon Department of Justice notified both PGE and PP&L that Portland was an allocated territory and had been made so by the 1972 Order. (App. U.) There even is an allegation in Columbia Steel's complaint that for 15 years OPUC was telling customers they could not switch utilities. (ER 160 ¶ 64.) Columbia Steel sued OPUC in the district court below in order to make OPUC *stop* articulating that it had displaced competition in Portland.[12]

What the Court of Appeals really means is that OPUC did not exercise its power in a manner authorized *under Oregon law* in 1972 to provide a foundation for OPUC's subsequent 20 years of clear articulation that Portland had been allocated. The Court of Appeals measured the 1972 Order against the Oregon statutes, and concluded that it didn't measure up. When the Court of Appeals holds that the 1972 Order does not *clearly articulate* a territorial allocation of Portland, it means that the 1972 Order *did not in fact allocate* Portland. The Court of Appeals turned the search for clarity into a search for authority, authority under state law.

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[12] Columbia Steel alleged in its complaint:

"The PUC contends that the [1972] Agreement created allocated service territories within Portland and that PP&L is barred from providing electric service to Columbia Steel. ... Columbia [Steel] is entitled to an injunction prohibiting the [Commissioners] from seeking to enforce the [1972] Agreement as an exclusive service territory agreement." (ER 35, 38, ¶¶ 35, 39.)

This Court warned against this in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 370-72 (1991). approving the following observation:

> "To be sure, state law 'authorizes' only agency decisions that are substantively and procedurally correct. Errors of fact, law, or judgment by the agency are not 'authorized.' Erroneous acts or decisions are subject to reversal by superior tribunals because unauthorized. If the antitrust court demands unqualified 'authority' in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law. We should not lightly assume that *Lafayette's*[13] authorization requirement dictates transformation of state administrative review into a federal antitrust job. Yet that would be the consequence of making antitrust liability depend on an undiscriminating and mechanical demand for 'authority' in the full administrative law sense." P. Areeda & H. Hovenkamp, Antitrust Law ¶ 212.3b, p. 145 (Supp. 1989).

This Court then added:

> "We agree with that assessment, and believe that in order to prevent *Parker*[14] from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." *Id.* at 371-72.

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[13] *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

[14] *Parker v. Brown*, 317 U.S. 341 (1943).

The Court of Appeals failed to heed this warning. It acted as if it were an Oregon appellate court, measuring the decisions of an Oregon administrative agency against the Oregon statutes. It was not, however, the job of the Court of Appeals to derail OPUC's policy by finding "errors of fact, law, or judgment" in the OPUC's 1972 Order. That was a job for OPUC itself, subject to review by the Oregon courts.

The job of the Court of Appeals was a different one, and the Court lost sight of it. It purported to apply the first prong of the *Midcal* test, but it did not. The *purpose* of the clear articulation requirement in the first prong is to ensure "that the State has not acted through inadvertence". *Ticor*, 504 U.S. at 636-37. "Inadvertence" is the least likely word that describes OPUC's decades-long insistence that competition had been displaced in Portland.

It is telling that the Court of Appeals disclaims any search for the state's *intent*. In explaining why its decision is not foreclosed by the contrary 1992 OPUC decision, it declares that the "issue decided by the 1992 OPUC is whether the 1972 OPUC had the intent" to allocate Portland. That, it says, is a different issue than the one the Court of Appeals was deciding. (App. A 24-25.) This is exactly backwards of what it should have been doing. The "intent" of OPUC is the ultimate and only question to be answered by the clear articulation requirement:

> "As long as the State as sovereign clearly *intends* to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." *Southern Motor Carriers*, 471 U.S. at 64.

Because the Court of Appeals misconceived its job, it looked backwards from the 1972 Order to focus on the concerns of the City of Portland that preceded that Order, and the accommodations that flowed from them. Had it focused on its

proper task of ascertaining whether it was the *state* that was suppressing competition in Portland in 1987, it would have looked *forward* from the 1972 Order, not backwards.

The will of OPUC to displace competition in Portland was manifest from 1972 onwards. The Court of Appeals failed to appreciate that suppression of competition in Portland was essential to the rate policy that OPUC imposed in Portland from 1974 forward, and that rate regulation is the fundamental task of OPUC.

As long as there had been competition, OPUC had no choice but to impose the same rates for PGE and PP&L in Portland. (*See above,* p. 6; App. L.) Beginning in 1974, however, OPUC imposed different rates for PGE and PP&L. It did so in the service of other OPUC policies. *Id.* For example, as long as Portland had been a competitive market and OPUC had had to maintain equal rates between PGE and PP&L, OPUC had to keep PP&L rates in Portland *lower* than in other parts of the state. This imposed discriminatory rates on other PP&L customers outside of Portland. The elimination of competition in Portland allowed OPUC to equalize rates among PP&L customers. (App. L, T.) *American Can Co. v. Davis*, 28 Or. App. 207, 225, 559 P.2d 898, 909 (1977).

OPUC could not maintain the integrity of its differential rate structures if large industrial customers like Columbia Steel switched utilities, thereby abandoning to the residential customers the burden of supporting the rate base.[15] When

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[15] The court of appeals betrayed a startling naivete on this point. The opinion finds that Columbia Steel's argument has "considerable force" because PP&L "was able to take a good customer away from PGE", for its rates "were more competitive than PGE's." (App. A 19.) If competition were really permissible in this market, PGE's lower *residential* rates that OPUC had set would bring it all the residential customers, PP&L's lower *industrial* rates that OPUC had set would bring it all the industrial customers, and OPUC would have to start all over again with a new rate structure, for it is obliged to set rates high enough to produce a sufficient return to each

OPUC told PGE and PP&L that a customer like Columbia Steel could not switch, there was a more important state policy at issue than whether the 1972 Order was missing a statutory citation. The federal courts below made PGE a scapegoat for complex regulatory policies they did not perfectly understand.

The Court of Appeals' new addition to the state action doctrine is now a means by which it can overturn current state administrative policies of which it disapproves by finding errors in foundation documents that are decades old. This Court alluded in *Omni* to the limits that a federal court should observe in undertaking just such a task. This Court should now grant certiorari to clarify the limitations on a federal court reviewing decisions of state administrative agencies.

II. The decision below conflicts with decisions of the Eleventh Circuit and the Tenth Circuit.

A. The Eleventh Circuit decision in *Praxair*.

The decision of the Court of Appeals conflicts with the decision of the Eleventh Circuit in *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), cert. denied, __ U.S. __, 116 S.Ct. 1678, 134 L.Ed.2d 781 (May 13, 1996).

Praxair, a large industrial customer, wanted to switch from Florida Power & Light (FPL) to Florida Power Corp. (FPC). There was an ambiguity about an order of the Florida Public Service Commission as to whether it had made a territorial allocation to either utility of the county in which Praxair's plant was located.

The District Court in Florida, like the Court of Appeals below, limited its inquiry to the parties' original agreement and to the original order, which it found to be unclear. The Eleventh Circuit rejected the District Court's restricted

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utility.

interpretation of the state action doctrine, and reversed. The issue, said the Eleventh Circuit:

> "is whether state action can be inferred from the manner in which the State conducts itself in relation to the parties' attempts at competition." *Id.* at 610.

The Eleventh Circuit held that the District Court erred by not considering what had happened in the years *after* the Commission had issued its order.

> "In our judgment, the district court erroneously focused primarily on the utilities' and Commission's intent in the original proceedings which culminated in the 1965 approval order, and did not give proper consideration to the parties' conduct and the Commission activity since that time." *Id.* at 612.

As for the degree of clarity that was necessary in the original agreement, the Eleventh Circuit did not impose the "rigorous" test of "clear articulation" that the Court of Appeals imposed below. Instead, the Eleventh Circuit inquired whether it was "plausible" or "reasonable" that the agreement might be interpreted to allocate the county. The Eleventh Circuit went on to hold that:

> "Even if it was not clearly intended in the original agreements to include Brevard County, however, the way the parties and particularly the Commission have conducted themselves since that time indicates that Brevard County has been allocated to FPL's service area. An agency's interpretation of its own regulations must be given controlling weight unless that interpretation is plainly erroneous or inconsistent with the regulation. ... For 30 years since that time, the Commission and the utilities have treated [the town in Brevard County] as part of Florida Power & Light's service territory. ... Florida's regulatory scheme met

> the two-pronged *Midcal* test so that the utilities are immune from Sherman Act challenges." *Id.* at 613-14.

The case below would have come out the opposite way under the Eleventh Circuit's interpretation of the state action doctrine. The Eleventh Circuit searched for the intent of the State. The Court of Appeals below rejects the search for intent. The Eleventh Circuit treated the issue as one of fact. The Court of Appeals below expressly denies that it is one of fact. (App. A 25.) Most important, the Eleventh Circuit looked to the history after the original order to make its decision, while the Court of Appeals refused to be dissuaded by the havoc it might wreak on state policies evolved over the succeeding decades. The Eleventh Circuit's approach is sensitive to the state's interests. The Court of Appeals below is indifferent to them.

B. The Tenth Circuit decision in *Lease Lights*.

The decision of the Court of Appeals conflicts with the decision of the Tenth Circuit in *Lease Lights*.

In *Lease Lights*, the Oklahoma Corporation Commission ordered the utility to restructure its rates for outdoor lighting. Independent lighting contractors were injured, and filed a treble damage action. The Oklahoma Supreme Court eventually overturned the rates ordered by the Commission as constitutionally invalid. The Tenth Circuit nevertheless held that the utility was immunized by the state action doctrine:

> [T]here should be a defense for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.4b, at 132 (Supp. 1987). To rule otherwise would require regulated industries to seek judicial review of every order of a regulatory agency to ensure that compliance

> does not later subject them to antitrust liability." *Id.* at 1334.

The conflict with the decision of the Court of Appeals below needs little comment. Even if OPUC's directions were unauthorized under state law, PGE should not be punished for obeying them. This is a fundamental issue of the greatest importance to all regulated industries, and federal law should not subvert state policies by punishing utilities who obey directions in good faith.

III. The decision below is in conflict with a final judgment of an Oregon court, to which the Court of Appeals refused to give full faith and credit.

One reason why federal courts should refrain from acting as reviewers of state administrative agencies is that states already have a system to do that. If the federal courts undertake to do the same thing, there is a risk of collision.

Whether the 1972 OPUC order allocated Portland was an issue of state law. The most authoritative forum to decide that issue was an Oregon forum: OPUC itself, subject to review in the Oregon courts. That issue was therefore submitted to OPUC in the 1990-92 proceeding. The federal courts below should not have undertaken to decide the same issue. Least of all should they have undertaken to decide it contrary to the state decision.

The fundamental holding of the 1992 Order was printed in bold letters on the cover of that order:

> "DISPOSITION: TERRITORIAL ALLOCATION CONFIRMED"

(App. M 1.) That is, OPUC held that Portland was already allocated between PGE and PP&L, and had been since 1972.

On rehearing, overruling Columbia Steel's arguments on that point, OPUC again declared that Portland had been allocated by the 1972 Order itself. (*See above* at pp. 8-9.)

Columbia Steel challenged OPUC's decision on appeal to the Oregon courts. Columbia Steel's appeal ended in a final state court judgment *between these parties* confirming that Portland has been an allocated territory since 1972.

The Court of Appeals below nevertheless refused to honor that final state judgment affirming the 1992 Orders. The issue decided in the state forum supposedly was not "identical" to the issue it was deciding. It held that the issue decided in the state forum was the "intent" of the state, while it decided instead whether the displacement of competition was "clearly articulated and affirmatively expressed" as state policy. (App. A 25.)

There are two grave flaws in what the Court of Appeals did. First, it turned a determinedly blind eye to what the state decision actually held. OPUC's 1992 Orders declare what OPUC had *done* in 1972, not merely what it had intended to do.

Second, as we have said, the "intent" of the state is something the Court of Appeals *should* have been trying to ascertain itself. As for the label "subjective intent" in the Court of Appeals' opinion---the word "subjective" is a dismissive epithet by which the Court of Appeals would discount the reasoning process behind a judgment it does not intend to honor.

OPUC's reasoning process in its 1992 Orders was no more "subjective" than that of the Court of Appeals. OPUC engaged in the same kind of legal analysis as did the Court of Appeals, except that it did it better. For example, the Court of Appeals set great store by the absence of a citation to the *number* of the allocation statute in the 1972 Order. (App. A 16.) OPUC, however, found it more significant that the 1972 Order used the *language* of the allocation statute (Or. Rev. Stat. § 758.415) to

make statutory findings, the effect of which were to create an allocation by operation of law without anything more.[16] (App. M 18.) For OPUC, substance was more important than form; for the Court of Appeals, vice versa.

A second example: OPUC in the 1972 Order explicitly ordered the transfer of thousands of customers. In the 1992 Orders, OPUC pointed out that it could only have done so under the allocation statute. (App M 18.) The Court of Appeals ignores what OPUC says it could do and did do, and instead hypothesizes that OPUC's transfer of customers must instead have been merely a one-time "incident" to a transfer of property. In order to reach its result, the Court of Appeals has to attribute to an Oregon agency a power under Oregon statutes that the agency itself has declared that it does not possess.

However, we did not file this petition to ask this Court to decide that OPUC's analysis of its own Order is better than the Court of Appeals' analysis. We filed this petition to ask this Court to hold that the Court of Appeals overstepped its bounds. If the Court of Appeals had heeded the warning of *Omni*, it would have hesitated from the beginning to start down this road to override a state agency's interpretation of its own orders and its state's statutes. That road belongs to the state agency and the state courts. If the federal courts insist on occupying it as well, the risk of collision is great.

There is a collision in this case. The state proceeding conclusively established, as between these same parties, that it was illegal under state law after 1972 for PGE and PP&L to compete in Portland. The federal proceeding established that it was illegal under federal law *not* to compete. If the decision below stands, then state and federal law imposed upon PGE a choice of poisons. The Court of Appeals now punishes PGE

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[16] After all, why would the 1972 OPUC have used the language of the allocation statute, Or. Rev. Stat. § 758.415, if it was not acting under that statute?

with treble damages for the offense of having correctly understood and obeyed its regulatory agency and state law. OPUC regulates, and the federal court inflicts a catastrophe for complying with that regulation. This is no way to run a regulated industry, and it is no way to run a federal system.

The conflict would never have reached this point if the Court of Appeals had given full faith and credit, as required by 28 U.S.C. § 1738, to the final state decision, binding upon these same parties, that Portland has been lawfully allocated since 1972. When a United States Court of Appeals fails to honor a state judgment, it is a blow to federalism. It is a blow for which there can be no remedy, save in this Court.

IV. The questions presented are important.

The industry is undergoing massive changes. There are movements underway at the federal and state level to reintroduce competition into the sale of electricity. Deregulation, wheeling, access to transmission systems are the subject of intense planning in the Federal Energy Regulatory Commission (FERC), in state regulatory commissions, and in the utilities.

The coming changes involve uncommon problems in finding what degree of competition can coexist with the necessity of having a single utility continue to deliver the power in any given area. FERC has recently issued a 500-page rule that grapples with some of these novel problems. *See* 18 C.F.R. Part 35.

There will be missteps, and there will be orders issued by regulatory commissions that in the hindsight of 20 years later will seem ambiguous and perhaps even invalid. But it will not aid the current process if the orders that are issued, balancing regulation with competition, are treated by the federal courts as potential time bombs that may explode in treble damages years later.

V. PGE should at least have a jury trial.

It was fundamentally unjust to impose treble damages by summary judgment for a supposedly unlawful conspiracy, when PGE should at least have been given the opportunity to present to a jury that its actions were not prompted by any supposed conspiracy, but by a desire to obey the orders of its regulatory agency.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Barbee B. Lyon
Counsel of Record
James C. Loy
David S. Aman
TONKON, TORP, GALEN,
MARMADUKE & BOOTH
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2099
(503) 221-1440
Attorneys for Petitioner

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